Supreme Court, U.S.
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No. 93-1597

In The

Supreme Court of the United States

October Term, 1993

BALMAIN B. COMRIE and JUANITA A. COMRIE, on behalf of themselves and of all others similarly situated,

Petitioners,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN W. LITTLE, III
(Counsel of Record)

TROY D. FERGUSON
STEEL HECTOR & DAVIS
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401
(407) 650-7200

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED (AS REPHRASED)

Whether a home mortgagor's request for an advisory opinion that certain counterclaims and affirmative defenses can be asserted successfully against a lender, if and when an action arises in state court to enforce the mortgage loan, constitutes a justiciable controversy under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a).

RULE 29.1 STATEMENT

Respondent, Federal National Mortgage Association, has no parent companies or subsidiaries.

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STATEMENT OF THE CASE

In 1983, Petitioners, Balmain B. Comrie and Juanita A. Comrie ("the Comries"), purchased a house from General Development Corporation ("GDC"), a large developer of real estate in Florida. The Comries travelled to Florida, at GDC's expense, prior to making this purchase and obtained mortgage financing from GDV Financial Corporation ("GDV"), a subsidiary of GDC.

Respondent, Federal National Mortgage Association ("Fannie Mae"), is a federally chartered corporation which serves the housing industry by operating in the secondary, rather than the primary, mortgage market. Fannie Mae does not originate loans but purchases residential mortgage loans which are closed by primary lenders such as mortgage companies, savings institutions and commercial banks.

Fannie Mae, in the ordinary course of its business, subsequently purchased the Comries' note and mortgage from GDV in the secondary mortgage market. The Comries did not have any dealings or communications with Fannie Mae when they purchased their home from GDC or obtained mortgage financing from GDV. In addition, the Comries did not rely upon any act or omission by Fannie Mae when they entered into their transactions with GDC and GDV.

The Comries do not claim that their GDC house was defective in any way. They now seek, however, to avoid their monthly mortgage obligations because they believe that they paid more money for their home than it was actually worth. The Comries contend that, prior to making their 1983 house purchase, GDC should have told

them that they could have purchased comparable houses from GDC's competitors and from one of GDC's subsidiaries at lower prices and that GDC's prices were not competitive. *See* Petitioners' Appendix ("App.") No. 1, 46-47. Furthermore, although they did not rely upon GDV's appraisal of their home prior to purchasing it from GDC, the Comries allege that the appraisal was inflated. App. No. 1, 19-22. The Comries sued Fannie Mae for declaratory relief and for damages based upon unconscionability by GDC and GDV and breach of fiduciary duty, breach of contract and negligence by GDV. *Id.* at 1-69. GDC and GDV are not parties to this action.

The Comries' statement of the case is generally correct with respect to the case's procedural history, but it contains various factual statements – e.g., that the District Court dismissed their second amended complaint without leave to amend, Pet. 6, and that criminal and bankruptcy proceedings were decided in a certain manner, Pet. 11 – that are either wholly erroneous or go far beyond the allegations contained in their complaint.

In the body of this Response, Fannie Mae will discuss the facts as relevant to the legal issues presented.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION SEEKS AN ADVISORY OPINION FROM THIS COURT WHICH WILL HAVE NO EFFECT WHATSOEVER ON THE JUDGMENT RENDERED BELOW

The Comries challenge the District Court's dismissal of their claim for declaratory relief for lack of a justiciable

controversy. This is the only issue raised by the Petition. Pet. (i). However, this Court's resolution of that issue will result in the needless exercise of judicial labor because the District Court dismissed Count 1 on alternate grounds that are *both* uncontested by the Comries *and* sufficient to support its judgment.

During the proceedings below, Fannie Mae argued and the District Court agreed that even if a justiciable controversy existed between the parties, numerous factors militated against the court's exercise of its discretionary declaratory-relief jurisdiction. *See* App. No. 2 at 2; R.1:37-6-11; R.2:47-7. These factors included, but were not limited to, the following:

1. Piecemeal litigation would result because, by the Comries' own admission, a declaratory judgment would not settle the alleged controversy between them and Fannie Mae, for they are saving other related claims and defenses to assert against Fannie Mae in the future and in another forum. R.2:47-18-19.

2. The District Court had no jurisdiction over the property underlying the Comries' note and mortgage. Therefore, a declaration that Counts 2 through 5 of the second amended complaint constituted viable claims and defenses to Fannie Mae's enforcement of the note and mortgage would have had no effect on the appropriate Florida state court's exercise of its *in rem* jurisdiction over the subject property *if* the Comries defaulted and *if* Fannie Mae filed a mortgage foreclosure proceeding.

3. The District Court's determination that the Comries' purported defenses were legally deficient would not preclude them from defaulting on their mortgage note,

thereby failing to settle the alleged "controversy" between the parties.

4. The Comries' request for a determination as to whether Fannie Mae could successfully assert a holder-in-due-course affirmative defense in a hypothetical mortgage foreclosure action not only was too speculative to warrant declaratory relief but also would have sabotaged the sequence of proof and the allocation of burdens of proof that are central to the Florida Uniform Commercial Code policy of encouraging the transfer of negotiable instruments. *See* R.1:37-8-9.

5. The putative class that the Comries sought to represent consisted of individuals who had defaulted on their mortgages and notes and were already parties to pending state court proceedings in which the matters in controversy between Fannie Mae and the state court mortgagors were being fully litigated.

Relying upon *Angora Enters., Inc. v. Condominium Ass'n of Lakeside Village, Inc.*, 796 F.2d 384 (11th Cir. 1986), the District Court recognized that it "could properly have refused to address the merits of the claim by resort to its inherent discretion to decline to entertain a declaratory action." *Id.* at 387. This alternative ground for dismissing Count 1 is consonant with settled precedent of this Court which makes it clear that the Federal Declaratory Judgment Act "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952). *See also Green v. Mansour*, 474 U.S. 64, 72 (1985) ("The propriety of issuing a declaratory judgment may depend upon equitable considerations, and is

also 'informed by the teachings and experience concerning the functions and extent of federal judicial power.' ") (citation omitted); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction.").

The Comries do not contest the District Court's exercise of its discretion to decline declaratory relief nor can they. The District Court's alternate grounds for dismissing their claim for declaratory relief, irrespective of the existence of a justiciable controversy, are sufficient to support its judgment and remain unchallenged by the Comries. Consequently, granting the Petition would serve no useful purpose.

II. THE QUESTION PRESENTED IS MOOT

In addition to their claim for a declaratory judgment in Count 1, the Comries sought damages from Fannie Mae based on unconscionability by GDC and GDV (Count 2), breach of fiduciary duty by GDV (Count 3), breach of contract by GDV (Count 4) and negligence by GDV (Count 5). The District Court found these claims legally deficient on the merits and dismissed them accordingly. App. No. 2 at 2-5. The Court of Appeals for the Eleventh Circuit affirmed. App. Nos. 3 and 4.

These dismissed claims, however, are the very same causes of action that the Comries sought to "test" in their claim for a declaratory judgment in Count 1. Specifically, the Comries sought a determination as to whether they

would be successful in asserting these claims as affirmative defenses and counterclaims against Fannie Mae if and when an action arose to enforce the note and mortgage in Florida state court.

While the District Court did not render a declaratory judgment, its finding with respect to the legal sufficiency of the claims set forth in Counts 2-5 is precisely the determination that the Comries sought in Count 1. As a result, even if the District Court had found a justiciable controversy present and exercised its discretion to render declaratory relief, its determination that the claims contained in Counts 2-5 were legally deficient would not change the result below. Those rulings, which are not before this Court, render the issues raised herein moot. Therefore, granting the Petition would constitute a mere academic exercise of no consequence.

III. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Comries requested an advisory opinion from the District Court. R.2:47-12-13. Essentially, the Comries asked the District Court to answer the following hypothetical question: *If* they decided to default on their mortgage loan, and *if* Fannie Mae subsequently filed a foreclosure action in state court, and *if* the Comries asserted affirmative defenses and counterclaims to the foreclosure action, and *if* Fannie Mae in turn raised its holder-in-due-course status – who would win?

The District Court declined to act as the Comries' counsel observing the Eleventh Circuit's admonition that

"[f]urnishing such guidance prior to the making of the decision . . . is the role of counsel, not of the courts." *Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir. 1981). In so doing, the District Court expressly relied upon the controlling authority of this Court as set forth in *Emory v. Peeler*, 756 F.2d 1547, 1551-52 (11th Cir. 1985) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)).

The Comries did not allege that they had been injured by past conduct attributable to Fannie Mae, and, like the juror in *Emory*, 756 F.2d at 1552, cited in the District Court's opinion, they failed to allege that any such conduct by Fannie Mae had continued or would be repeated in the future. The record below is devoid of any allegation or showing by the Comries that Fannie Mae threatened or did anything to them, much less communicated with them. The Comries' attempt in this proceeding to suggest otherwise, *see* Pet. 26, is untenable. Any potential harm they may experience is entirely based on a hypothetical contingency.

Yet, the Comries urge this Court to adopt a rule that would require federal courts to render advisory opinions. Pet. 24. Their suggestion that this Court's precedent supports such a result arises from a misreading of *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972), Pet. 24-28, and flies in the face of a long line of authority from this Court that " '[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions.' " *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 113 S. Ct. 2173,

2178 (1993) (citation omitted). *See also Ashcroft v. Mattis*, 431 U.S. 171, 172 n.2 (1977) ("The second amended complaint also alleges that appellee has another son who '*if* ever arrested or brought under an attempt at arrest on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be *in danger* of being killed by these defendants or other police officers . . . .' Such speculation is insufficient to establish the existence of a present, live controversy.") (citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' "); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (" '[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' ").

The Circuit Courts of Appeal are, of course, in accord. *See, e.g., Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988) ("You cannot go to a federal court for advice on the legality of a proposed course of action. You must be party to an existing legal dispute. This is true whether you are seeking a declaratory judgment or any other form of relief . . . ."); *Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir. 1981) ("[T]he appellants are seeking a declaration that *if* they deny appellee's readmission application, and *if* the appellee subsequently brings an antitrust action based on that denial, then the appellants will be protected from liability by virtue of the *Parker v. Brown* and *Noerr-Pennington* doctrines. We believe that a declaration to this effect would constitute an impermissible 'opinion advising what the law would be upon a hypothetical state of facts.' . . . '[T]here [can] be

no judicial determination that a valid defense exist[s] to a non-existent cause of action.' ") (footnote omitted) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937), and *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967)); *BP Chems. Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 981 (Fed. Cir. 1993) ("[T]he existence of a patent held by a competitor is insufficient basis for a declaratory action to invalidate the patent.").

IV. THERE IS NO CONFLICT WARRANTING CERTIORARI REVIEW

The District Court's determination that the Comries failed to satisfy the threshold case or controversy requirement of Article III of the United States Constitution, and the actual controversy prerequisite of 28 U.S.C. § 2201(a), does not conflict with any decision of this Court or of the other Circuit Courts of Appeal. The allegedly conflicting decisions are distinguishable on their facts and on the law.

The Comries' reference to *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937), is but one example of their attempt to manufacture conflict where there is none. Pet. 21. As an initial matter, the hypothetical contingencies present in this action are absent from *Edelmann*. Specifically, in *Edelmann*, the alleged infringer of a patent sought declaratory relief where the owner of the patent charged it with infringement, notified the industry of such charges of infringement and told the alleged infringing company's customers and potential

customers that, unless the infringement was discontinued, a lawsuit would be filed against the infringer and dealers. *Id.* at 853.

More importantly, the Comries' position that their "doubt" (as to the enforceability of their note and mortgage) constitutes a justiciable controversy was expressly considered and rejected by the Seventh Circuit in *Vickers v. Henry County Sav. & Loan Ass'n*, 827 F.2d 228, 231-32 (7th Cir. 1987) ("Any potential harm appellants may experience is entirely based on a hypothetical contingency: if they default on their loan, and if the Loan Association chooses to pursue them personally first rather than foreclose on the property it has secured, they would then have to defend on the issue they raise now. . . . There must be some actual or imminent threatened harm before the matter is justiciable. Any potential harm here, based as it is on hypothetical contingencies, is not imminent, and the appellants are without Art. III standing."); *see also Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994) (The "case or controversy" requirement "keeps federal courts in the business of resolving existing legal disputes and out of the business of offering advice on the legality of a proposed course of action.").

Whether a justiciable controversy exists under 28 U.S.C. § 2201(a) is determined on a case-by-case basis with necessarily differing results. *Golden v. Zwickler*, 394 U.S. at 108 (" 'Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory

judgment.' "). The very cases cited by the Comries to establish "conflict" turn on the particular circumstances facing those courts and are readily distinguishable from the instant case. Pet. 18-27. *Cf., e.g., Doe v. Bolton*, 410 U.S. 179, 188-89 (1973) (physicians presented a justiciable controversy where they were *personally threatened* with criminal prosecution in the event they violated a recent state abortion statute *and other physicians had been prosecuted under the predecessor abortion statute*); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. at 507 ("Although appellees have indicated that they will not prosecute under the Michigan act until adequate land-based pump-out facilities are available to service vessels equipped with sewage storage devices, they *have* sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible.").

Moreover, the Comries' discussion of *Lindsey v. Normet*, 405 U.S. 56 (1972), is clearly inapposite. Pet. 21-23. The justiciability of the claim for declaratory relief filed in *Lindsey* was neither raised by the parties nor discussed by the various courts. Why the Comries refer the Court to *Lindsey* is a mystery.

As previously discussed, the District Court's refusal to provide the Comries with an opinion advising what the law would be upon a hypothetical state of facts (that is, whether certain claims and defenses could be asserted successfully against Fannie Mae in a hypothetical state court lawsuit *if* the Comries defaulted and *if* Fannie Mae or some other lender holding their mortgage loan brought an action to enforce the mortgage) is consistent with well-established precedent of this Court. *See supra* section III. In sum, the "conflict" which the Comries hope

to create before this Court is not real and does not satisfy any of the criteria delineated in Supreme Court Rule 10.1.

V. NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT

The decision below turns solely upon an analysis of the particular facts and circumstances involved and affects only the immediate parties to the case. The Comries state that *their* individual case does "not warrant the expense of proving GDC's fraud and [Fannie Mae's] lack of standing as a holder in due course." Pet. 34. Their assertion that the decisions of the District Court and of the Eleventh Circuit have somehow adversely affected the rights of "approximately 1,500" individuals is wholly misplaced.

The District Court specifically denied the Comries' motion to certify the class as moot given their failure to state a claim for relief. App. No. 2, at 5 n.3. The class certification issues were neither fully briefed by the parties nor considered by the District Court. Consequently, the unnamed members of the putative class could not possibly be affected by the District Court's actions.

Yet, the Comries would have the Court in this proceeding certify the putative class based on their belief that "[w]ithout a class action, these victims are essentially left without a remedy." Pet. 13-14. Such a result, however, would transmogrify the criteria for certifying a class embodied in Federal Rule of Civil Procedure 23. The Comries' concern about the District Court's dismissal of their claim for declaratory relief is admittedly secondary to their desire to have this action certified as a class

before this Court. Clearly, no special and important reasons exist to grant certiorari. S. Ct. Rule 10.1.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

JOHN W. LITTLE, III
(Counsel of Record)

TROY D. FERGUSON
STEEL HECTOR & DAVIS
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401
(407) 650-7200

Counsel for Respondent